

## EXECUTION OF DECREE

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Courts having decreed a remedy, it must follow up to ensure that it is being adhere to. When we move to society, it is sometimes heard from the mouth of the successful litigant/party as well as the wrongdoer in the society that a decree has been traveling a number of years in the court's file and lastly the wining party loose their interest to execute as they think, that it is not possible to get fruits of the decree. It is high time the interest of bonafide civil litigants were saved and this is only possible when a court not only decree a remedy but also follow, it up to ensure that it reaches it logical and fair conclusion.

Addressing the inaugural ceremony of new building of Hon'ble High Court of Jharkhand, Hon'ble President of India Smt. Draupadi Murmu, highlighted the matter of slow progress of execution of decree and order's.

Execution is the most important aspect of Civil justice. Success or failure of the system of Civil justice depends on the rate of success in executing the decrees of Civil Courts. Legislature has drafted and introduced exhaustive and exemplary provisions of execution in the code of Civil Procedure. There are as many as 106 rules in order 21 which deals with execution and from section 36 to 74 (both inclusive) embodied in the code of Civil Procedure. From the vast number of sections and rules a beginner might feel intimidated but in reality the work of execution is anything but complicated.

The thing is , as has been mentioned somewhere, a good vehicle is not to be badly driven. Procedure is but a safe vehicle of justice.

The journey of execution of decree is started from filing of execution petition in terms of rule 11(2) of Order XXI of CPC.

### **1. Application for execution of a decree**

Rule 11(2) of order XXI of the code of civil procedure deals about the application for execution of a decree this rule prescribes 10 particulars required to be filed up by the decree holder who applying for execution of the decree. According to this rule the following particulars in alphabetical order required to be filed up.

10. Application for execution— Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf,

or if the decree has been sent under the provisions herein-before contained to another Court then to such Court or to the proper officer thereof.

11 . Oral application— (1) Where a decree is for the payment of money the Court may, on the oral

application of the decree-holder at the time of passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

**(2) Written application**—Save as otherwise provided by sub-rule(1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely—

- (a) the number of the suit;
- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the Court is required whether—
  - (i) by the delivery of any property specifically decreed;
  - (ii) by the attachment, or by the attachment and sale, or by the sale without attachment, of any property;]
  - (iii) by the arrest and detention in prison of any person;
  - (iv) by the appointment of a receiver;
  - (v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

The application required verification of the Decree holder or authorized person should be mentioned in the execution petition so that the court can proceed smoothly.

The verification of pleading (Order 6 rule 15) and verification of execution petition are distinct. The requirement of rule 11(2) are fulfilled if the verification is to the satisfaction of the court -

[I.S.and I. Agency Ltd. Vs. Municipal Corporation of Delhi. AIR 2002 Del.347.](#)

After institution of execution petition it is required to be heard preliminary to proceed further just after office note/stamp reporting submitted by Sheristadar. The preliminary hearing to proceed further is necessary, because the nature of the decree decides how to execute the decree. Further in terms of rule 17 of order XXI, court shall require to ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with. The manner and mode of execution is to be decided on the basis of the nature of decree.

**2. Amendment in Execution petition vis- a-vis correction in decree:-** Sometime, it is to be seen that there is some mistake in the execution petition. In this regard it is important to note that if there is mistake in any particulars given in the execution petition that can be amended in terms of section **141** read with Sec. 151/152 and order 6 rule 17 CPC and also read with rule 17 of order XXI CPC.

But such amendment not to be vexed with the correction/amendment required in the decree. Sometimes there is mistake in the decree, and as per the provisions of section 152 CPC, the Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

Generally, it has to be seen that there is mistake in the schedule of the property in the decree which create hurdles to execute the decree. In such cases the decree can only be corrected by resorting the provisions u/s 152 CPC when the plaint of the plaintiff by which decree is levied was correct. If there is omission in the plaint about the identification of the property in terms of order 7 rule 3 of the CPC, in such cases court having no jurisdiction to alter/modify/amend/ and correct the decree.

In the case of **Niyamat Ali Molla VS Sonargon Housing Co-operative Society Ltd. 2008 0 AIR(SC) 225** Hon'ble Supreme court held (a) Code of Civil Procedure, 1908 – Section 152 – Power of the court to correct its own error in a judgment, decree or order from any accidental slip or omission is based on the principle of *actus curiae neminem gravabit*, i.e., nobody shall be prejudiced by an act of court. (Para 18)

(b)Code of Civil Procedure, 1908 – Sections 151 and 152 – Besides power u/s 152, courts also have general inherent powers – Courts also have duty to see that the records are true and present the correct state of affair – Such jurisdiction can be exercised to review its own judgment – A decree may, therefore, be corrected by the Court both in exercise of its power under Section 152 as also under Section 151 – The power, however, cannot be extended to the resolving of controversial points; the Court cannot correct errors anterior to the proceedings before it. (Paras 19 and 21) (1967) 2 SCR 18; 30 Ch. 239 – Relied upon. AIR 1952 Cal. 86 – Approved.

(c)Code of Civil Procedure, 1908 – Section 152 – When a decree had been drawn up by the High Court, the Court can take recourse to Section 152 of the Code. (Para 23) AIR 2003 SC 371 – Relied upon.

(d)Code of Civil Procedure, 1908 – Sections 151 and 152 – No Court can modify, alter or add to the terms of its original judgment, decree or order – The statements contained in the body of the plaint sufficiently describing the suit lands – Only because some blanks in the schedule of the property have been left, the same, by itself, may not be a ground to deprive the respondents from the fruit of the decree – Appellant although choosing not to file any statement but examining himself as witness was in the full knowledge of the affairs – No interference in the impugned judgment required. (Paras 25, 26 and 28). Also see the the judgment reported in **(2003) 2 SCC 330**.

3. **Procedure for correction in the decree in terms of section 152 read with section 151 CPC:-** When any application is being filed for correction of a decree, before hearing the application, the court must examine the trial court's record(record of original suit). It must be kept in mind that no correction is permitted foreign to the subject. After examination of the original record (Original Suit), when the court comes to the findings that inadvertently the plaintiff or concerned party failed to fill- up khata number, JB number, plot number, boundary, or any type of other identification mark of the property in question, in the plaint for which decree has been drawn-up, which is sought to be executed not being

capable of execution, the same may be corrected if the pleadings and document available in the case record suggested that the same has been left out to fill-up/mentioned due to bonafide or accidental slip or for typing mistake. In such cases the application may be allowed.

- After admission of the execution petition as prescribes in rule 17(4) of order XXI CPC, the court shall enter in the proper register a note of the application and date on which it was made, and shall, subject to the provisions hereinafter contained , order execution of the decree according to the nature of application.

Rule 22 of order XXI talks about Notice to show cause against execution in certain cases:- Where an application for execution is made more than two years after the date of the decree the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed , why the decree should not be executed against him.

In the case of **Tata Steel Ltd. Vs. Manager Khadi Association, reported in AIR 2016 (Jhr) 80** ,it has held- CPC order XXI rule 22- Initiation of proceeding within two years- plea that no need to issue notice- Not tenable – Order XXI rule -22 does not bar the ld. trial court from issuance of notice.

#### 4. **Process for Execution**

Order XXI Rule 24:- Process for execution:- (1) When the preliminary measure (if any) required by the foregoing Rules have been taken the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

Subs. by Act 104 of 1976, Section 72 (w.e.f. 1st Feb., 1977).[(3) In every such process, a day shall be specified on or before which it shall be executed and a day shall also be specified on or before which it shall be returned to the Court, but no process shall be deemed to be void if no day for its return is specified therein.]

#### 5. **MODE OF EXECUTION**

There are as many as seven rules in this part as rule 30 to 36.

Rule 30 of order XXI deals decree for payment of money- Every decree for the payment of

money , including a decree for the payment of money as the alternative to some other relief, may be executed by detention in the civil prison of the judgment debtor, or by the attachment and sale of his property or both.

In the case of **Saraswatibai , Smt. Vs. Govindrao Keshavrao Mahajan reported in AIR 1961, M.P. 145**- it has been held that Order XXI rule 30 of the Code is of exhaustive of the modes in which a money decree may be executed.

Rule 31 of order XXI prescribes the provisions of execution of decree for Specific Movable properties.

**Rule 32 of order XXI CPC**

**Rule 32 Order XXI of Code of Civil Procedure 1908 "Decree for specific performance for restitution of conjugal rights, or for an injunction"**

(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced 18[in the case of a decree for the restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for 11[six months] if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such pro be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of 11[six months] from the date of the attachment, no application to have the property-sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not

been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

**2002 Amendment:-** Explanation- For the removal doubts , it is hereby declared that the expression “the act required to be done” covers prohibitory as well as mandatory injunctions.

*Illustration*

*A. a person of little substance. erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.*

A decree of restitution of conjugal rights implies that the guilty party is ordered to live with a aggrieved party. Restitution of conjugal rights is the only remedy which could be used by the deserted spouse against the other. A husband or wife can file a petition for restoration of their rights to cohabit with the other spouse. But the execution of the decree of restitution of conjugal rights is very difficult. The Court though is competent to pass a decree of restitution of conjugal rights, but it is powerless to have its specific performance by any law. The non-compliance of the issued decree results to constructive destruction on the part of the erring spouse. Decree of restitution of conjugal rights could be passed in case of valid marriages only. 58] In a decree of restitution, the party, against whom the decree is passed, cannot be compelled physically to restore cohabitation. A Court is not competent to direct that the wife or husband be, bodily handed over to other spouse and restrain him or her of liberty until he or she is willing to render him or her conjugal rights. As per provisions of the present Act, the

aggrieved party can move a petition for a decree after one year from the date of the passing of the decree and the competent Court can pass a decree of divorce in favour of the aggrieved party. Another advantage the aggrieved wife can have from this provision is that she can claim maintenance from husband.

Rule 34 of Order XXI- This rule prescribes the provisions relating to- Decree for execution of document and endorsement of negotiable instrument. There are six sub rules in this rule. This rule reads as :-

*34 . Decree for execution of document, or endorsement of negotiable instrument— (1) Where a decree is for the execution of a document or for the endorsement for a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.*

*(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.*

*(3) Where the judgment-debtor object to the draft, his objections shall be stated in writing within such time, and the court shall make such order approving or altering the draft, as it thinks fit.*

*(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.*

*(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the*

*following form, namely :—*

*"C.D., Judge of the Court of*

*(or as the case may be), for A.B. in suit by E.F. against A.B."*

*and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.*

*[(6) (a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the court as may be authorized in this behalf by the Court, shall cause the document to be registered in accordance with such law.*

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.]

When an objection is to be filed on behalf of the judgment debtor under sub rule (3) of rule 34 of Order XXI, the executing court have required to pass an order to the effect, with respect to the draft of a document or of an endorsement, such order is appealable under order XLIII rule 1 (i) of the code of Civil Procedure.

In execution of a decree for specific performance of a contract notice was served upon the judgment -debtor who did not appear and the draft sale deed was not served upon him. Sale deed was executed by the court. Judgment debtor cannot now raise objection that draft deed was not served upon him unless he can show prejudice. Service of draft deed upon the judgment debtor as contemplated under order 21 rule 34(3) is directory. **Darshan Vs. Gurdial AIR 1990 Punj 231.**

In execution of a decree for specific performance of a contract draft sale deed is served upon the judgment -debtor who files objection against the draft, court must consider the objection.

- **P. Venkanna Vs. B.Apparao AIR 1959 AP 666.**

### **DECREE FOR IMMOVABLE PROPERTY**

Rule 35 and 36 of order XXI both are related to decree for immovable property but there is a distinction between both. The possession referred to in sub rules (1) and (3) of order XXI, rule 35 is *Khas* or actual possession, while that referred to sub -rule (2) and 36 is formal or symbolical possession.

Rule 35 of order 21, laying down the provision, reads and illustrated as under:

**Decree for immovable property**— (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by a fixing a copy of the warrant in some conspicuous place on the property and proclaiming the beat of drum, or other customary mode, at some convenient place, the

substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

This rule describes the mode of obtaining possession- For possession of vacant land the court can order the removal or demolition of the constructions made during the pendency of the suit.

-Mohd.Ismail Vs. Ashiq Hussain AIR 1970 All

Decree for ejection against a tenant is binding upon the tenant's licensee- I&M Ltd. Vs Pheroze AIR 1953 SC 73,75.

By a decree the judgment debtor and his tenants were directed to deliver vacant possession to the decree holder. Judgment debtor raised construction and inducted tenants *pendente lite*. Executing court can order demolition of structure B.Gangadhar Vs B.G. Rajalingam -AIR 1996 SC 780.

There was a decree for delivery of possession against tenant only. No decree against sub tenant was passed since he was not party to the suit. So execution case against the sub-tenant was dismissed. This dismissal will not operate as a bar to a subsequent execution petition against the tenant nor an application of removal of obstruction against the sub-tenant – Ameena Vs. Sundaram. (1994) 1 SCC 743.

36 . *Decree for delivery of immovable property when in occupancy of tenant— Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.*

Where property has been leased out for raising construction and subletting shops, the landlord obtained eviction decree, but did not implead sub- tenants as party in the case even opposed their impleadment, the sub tenants are not bound by the eviction decree as they are

not rank trespasser, they cannot be evicted, the mode of execution of decree would be only **symbolic** possession.

- **Ratan Lal Jain Vs. Uma Shanker Vyas, AIR 2002 SC 804(808).**

#### **6. OBJECTION TO EXECUTION OF DECREE**

The main hurdles to execute the decree passed by the civil court, is the objection raised by the judgment debtors, strangers or the persons claiming under or through the judgment debtors, during the execution of proceeding. Generally, the objectors have raised their objections under section 47 and order XXI Rule 97, 99, 101 of the CPC.

#### **Section 47 & 74 and Order XXI rules ,97 to 103,104 and 105 to 106 of the Civil Procedure Code, 1908.**

##### **Historical Background of section 47 of the code of Civil Procedure**

The provision contained in section 47 of the code of Civil Procedure was originally absent in the code of 1859. For the first time it was introduced by Act no. XXII of 1861. Again some modification was made and section 244 of the code of Civil Procedure 1882 was enacted . In section 244 of the code of 1882 the word “discharge and satisfaction” was added. In section 244 of 1882 code there were three sub- sections and one explanation. The provision has been re- enacted as section 47 in the code of civil procedure, 1908 with necessary omission and extension of its, scope and application.

By virtue of Code of Civil Procedure (Amendment) Act, 1976 Act no. 106 of 1976 W.e.f. from 1<sup>st</sup> February 1977, Sub section 2 of section 47 was omitted.

Section 47 of the civil procedure code states as *“Question to be determined by the court executing the decree. In this section earlier there are three sub clauses but in terms of amendment made in the code of Civil Procedure by virtue of Civil Code Amendment Act no. 104 of 1976 w.e.f. 1 /2/ 1977 sub section 2 has been deleted and now there are two sub sections and two explanation in this section as per clause 1) all questions arising between the parties to the suit in which decree was passed, or their representatives and relating to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and by a separate suit.*

2) *The question to be determined by the court executing the decree means that a person is legal representatives of the parties to the suit or not.*

*Explanation I- As per this section parties to the suit means that the plaintiff whose suit is dismissed and the defendant against whom the suit is dismissed.*

*Explanation II- (a) For the purpose of this section a purchaser of decree shall be the deemed party to the suit in which the decree is passed.*

*(b) All questions relating to the delivery of possession of such property to the such purchaser or his representatives, shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.*

● **Procedure, to be adopted in dealing with the application under section 47 CPC.**

When an application under this section has been filed, according to rule 459 of old Civil Court rules of Hon'ble High Court of Patna corresponding to rule 431 of new Civil Court Rules of Hon'ble High Court of Jharkhand, and **G/L no. 15 of 1962** the petitions is required to be registered as misc. case.

Before registering the same as misc. case a preliminary hearing should be done to find out the prima facie case on the basis of merit of the application and when there is merit then only be registered as misc. case – **AIR 1951 Pat 372.**

In a judicial pronouncement by their lordship Hon'ble Mr. Justice D.N. Upadhyay in the case of **Nand Lal Sharma VS. Raj Kumar Sharma & Ors.** reported in 2014 (3) **JCR 657**, discussed about Civil Court rule 459 and section 47 of the Civil Procedure code.

In another case reported in 2013(4) **JCR 357** by their lordship Hon'ble Mr. Justice P.P.Bhatt in the case of **Krishna Kumar Agarwal VS. Smt. Draupdi Devi**, held that- *Civil Procedure code, section 47 – Application under – Rejected in limine- sustainability of – No mandatory provision under section 47 of the CPC that the application under section 47 is required to be registered as a miscellaneous case and only thereafter it can be disposed of- only requirement /obligation cast upon the court to decide the dispute in a judicial manner – order passed on careful consideration of the relevant fact.*

Recently in the case of **Rahul S. Shah Vs. Jitendra Kumar Gandhi reported in 2021(2) JLJR (SC) 459** Hon'ble Supreme Court held that the court exercising jurisdiction u/s 47 or U/O XXI must not issue notice on an application of third party claiming rights in a mechanical manner- the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating of suit if due diligence was exercised by the applicant – the court should allow taking of evidence during the execution proceeding only in the exceptional and rare cases where the question of fact could not be

decided by resorting to any other expeditious method like appointment of commissioner or calling for electronic materials including photographs or video with affidavits- the court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide , resort to rule 98(2), Order XXI as well as grant compensatory costs in accordance with section 35-A -U/s 60 ... term in name of the judgment debtor or by another person in trust for him or on his behalf should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

In view of the above judgment of Hon'ble Supreme Court, Hon'ble High Court of Jharkhand, Ranchi has been pleased to make the following amendments in the "Civil Court Rules of the High Court of Jharkhand" **Rule 115B**. The Court exercising jurisdiction under Section 47 of CPC or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant during the trial of the suit.

Therefore, it is incumbent to the court dealing with the application u/s 47 CPC must be heard preliminary and upon finding merit if any then only registered as misc. case and proceed further and if no case made out the application must be disposed of threshold.

**• All questions arising between the parties to the suit in which decree was passed or their representatives and relating to execution, discharge or satisfaction of the decree shall be determined by the executing court:- Meaning and scope :**

It means all questions which could properly arise or which could properly have been raised in the execution proceedings between the parties to the suit or their representatives.

Now the question arose what types of questions comes within the ambit of this section. Before answering this aspect of the matter it is kept in mind that there is a principle, that the "executing court cannot go behind the decree". The court has no power to comment the decree, fact or in law. The decree must be execute as it is. In **Addition Pains VS Sant Ram AIR 1970 SC 1475**, it was held that section 47 does not entitle the court to investigate into the question of validity of the decree when on the face of the record of it there is nothing illegal. **2014 SCCR 212**.

Generally three kinds of objection could be entertained in this section by the executing court as (A) Decree passed against dead person (B) The decree is vague and ambiguous and (C ) Without jurisdiction.

It is well settled by Catina of judicial pronouncement that the question raised by judgment debtor under this section that the decree sought to be executed is a nullity is a question to be determined by the executing court under this section. But it must be kept in mind that the executing court cannot adjudicate upon the legality and correctness of the decree unless the decree is nullity.

It is also necessary to keep in mind that in section 47 the word “representative” has been used and not the words legal representatives. Hence, the word used in this section does not mean legal representatives only. But a person who claim or step the shoe of another or inter meddles with the property of another shall be a party for this section. Further the word used representatives is not limited to the legal representatives of the deceased person, but it includes persons whom an interest has devolved by assignment, transfer or otherwise. In other words representatives includes not only the heirs, but executors or administrators and the transferee of the decree holders. The explanation further makes it clear that all questions relating to the delivery of possession of such property to the purchaser or his representative shall be deemed to be question relating to the execution: discharge or satisfaction of the decree within the meaning of this section

As noticed above a transferee of a decree either by assignment or by operation of law has a right to apply for execution of the decree as provided under order XXI rule 16 of the code of Civil Procedure. Hence the transferee of the decree is a representative of the decree holder within the meaning of this section.

As discussed above, the executing court is competent to determine the all questions arising between the parties to the suit in which decree was passed or their representatives relating to execution, discharge or satisfaction of the decree. But such question must be a question relating to the decree not otherwise.

*“The validity of the decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject- matter was wholly foreign to its jurisdiction or that he defendant was dead at the time the suit had been instituted or decree passed, or some other grounds which could have the effect of rendering the court entirely*

*lacking in jurisdiction in respect of the subject- matter of the suit or over the parties to it”*

*Awadh Bihari Tewari Vs Narain Tewari- AIR 1961 Pat 427 at page 433, 434*

In the case of *Vasudev Dhanjibhai Modi Vs. Rajabhat Abdul Rahman AIR 1970 SC 1475*, the apex court considering an objection to the decree as nullity held that when a decree is nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who is dead at the date of decree is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again when a decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears in the face of the record. When the matter of jurisdiction not appear on the face of the record and requires examination of the question raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

An objection under section 47 of the code of civil procedure when filed by the judgment debtor it is incumbent upon him to show that the decree was ex-facio nullity . For the said purpose, the court is precluded from making in depth scrutiny as regards the entitlement of the plaintiff with reference to not only his claim made in the plaint but also the defense set up by the judgment debtor. As the judgment of the trial court could have not been reopened, the correctness thereof could not have been put in question

*Haryana Vidyut Prasaran Nigam Ltd. Vs. Gulshan Lal (2009) 13 SCC 354.*

In the case of *Pratibha Singh Vs. Shanti Devi(2003) 2 SCC 330* while discussing the scope of the Section 47 of the code of the Civil Procedure, Hon'ble Supreme Court, held that when the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the court record caused by overlooking of provisions contained in order VII rule 3, in order XX rule 3 is capable of being cured. After, all a successful plaintiff should not be deprived of the fruits of the decree. Resort can be had to section 152 or section 47 of the code of Civil Procedure depending on the facts and circumstances of each case which of two provision be more appropriate, just and convenient to invoke. Being an inadvertent error not effecting the merit of the case, it may be corrected under section 152 CPC by the court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained, by the executing court as a question relating to execution, discharge or satisfaction of the decree within the meaning of

this section. A decree of a competent court should not be allowed to be defeated on account of an accidental slip or omission, we think it would be more appropriate to invoke section 47 CPC.

• **Resistance to execution/Resistance to delivery of possession to decree-holder or purchaser**

Section 74 and rules 97 to 103 of order XXI of the code of Civil Procedure. The applications under these rules required to be registered as Misc. case under rule 459 Old Civil court Rules corresponding to rule 431 of new Civil Court rules of Hon'ble High Court of Jharkhand.

74. Resistance to execution— Where the Court is satisfied that the holder of a decree for the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

97 . **Resistance or obstruction to possession of immovable property**— (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by **any person** in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

[(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

Under this rule the decree holder as well as any person may complain to the court about the resistance and obstruction in obtaining possession. When a person unreasonably and in the instance of judgment debtor resisted the delivery of possession in such case the decree holder may complain to the court executing the decree and on adjudication of the matter complained the court, and the court executing the decree order for removal of the obstruction or may pass any such order as deem think fit and proper.

In the case of [Brahmadeo Choudhary Vs Rishikesh Prasad Jaiswal AIR 1997 SC 856](#) , it has been held that the objection of the objector can be considered by the executing court

against the possession warrant and the court can stay the execution proceeding till the objection petition is decided by the executing court. In this case also the question came up before the court that whether the objector can claim adjudication of his right until he is actually dispossessed . The supreme court held that the claim could be adjudicated prior to actually dispossessed under rule 97 of order XXI CPC.

The same view was relied by the supreme court in the case of *Silverline Forum Vs. Rajiv Truost* AIR 1998 SC1756, Also *Rajesh Vs Sreenath* AIR 1998 SC1827.

In the case of *Tanzeem -E- Sufia Vs. Bibi Haliman*, AIR SC 3083 , it has been held that even if the objector filed a suit for declaration of right, title of part premises for which decree sought to be executed. The executing court shall have power to decide the objection under order XXI rule 97 CPC.

[98 . **Orders after adjudication**— (1) Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination and subject to the provisions of sub-rule (2),—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during the pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

99 . **Dispossession by decree-holder or purchaser**— (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

This rule applies where the person other than the judgment debtor is dispossessed by the decree holder or the purchaser he can claim for his dispossession and established his independent right, title. See *Brahmadeo Choudhary Vs Rishikesh Jaiswal* ( Supra)

**100 . Order to be passed upon application complaining of dispossession**— Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

**101 . Question to be determined**— All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

In the case of *N.S.S. Sharma Vs. M/S Goldstone Exports (p) Ltd. And others reported in AIR 2002 SC 251*- it has been held that Resistance or obstruction to possession made in execution – All relevant issues arising in the matter on an application under order XXI rule 97 or rule 99 shall be determined by the executing court and not by separate suit.

In the case of *Vol Builders pvt. Ltd.& Anr. Vs. Janab Salim Saheb & Anr reported in 2009 (1) JCR 318 (Jhr)*, it has been held that where two separate suits were filed – one by objector for declaration of right, title and interest, over the suit property on the basis of agreement for sale- Another suit was filed for injunction in respect of suit property- Suit on the basis of Agreement was dismissed – Appeal against is sub- Judice- Knowing about the pendency of the two suits, court below can not proceed to embark upon a separate inquiry on it own on the issue raised ( Order XXI Rule 97,98,101,103,and 104 explained)

Also in the case of *Sushil kumar sureka Vs. Santosh Kumar Singh* reported in *2009(3) JCR 740 (Jhr)* it has been held that the objection under order XXI rule 98,99,100, and 101- objection were repeatedly rejected up to High Court- Suit filed by the father of the

objector is pending- A case of gross abuse of process of law- order impugned set aside with a nominal cost of ₹ 2500/-.

**102 . Rules not applicable to transferee pendent lite**— Nothing in rules 98 and 100 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Explanation—In this rule, "transfer" includes a transfer by operation of law.

This rule is recognizes the doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act, 1882

In the case of **Usha Sinha Vs. Dina Ram and others reported in (2007) 7 SCC 144** the Hon'ble apex court elaborately discussed this rule- Object and scope of order 21 rule 102 restated- It based on justice equity and good conscience – A transferee from a judgment debtor is presumed to be aware of the proceeding before a court of law- Held if, unfair inequitable or undeserved protection is afforded to a transferee pendente-lite, a decree-holder will never be able to realise the fruits of the decree – Transfer of Property Act 1882 S. 52.

●**Doctrine of Lis pendense**- person purchasing the property from the judgment debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of decree – Held resistance at the instance of transferee of a judgment debtor during pendency of the proceeding cannot be said to be resistance or obstruction by a person in his own right and, therefore is not entitled to get his claim adjudicated – Civil Procedure code, 1908 Or. 97 and 102.

**103 . Orders to be treated as decrees**— Where any application has been adjudicated upon under rule 98 or rule 100 the other made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

In the case of **Jogindera Kaur @ Jogender kaur Vs. Kali Prasad @ Kalu Prasad , 2003 (2) JCR (Jhr) 149**, it has been held that the order passed under rule 97,99,98,and 100 and 101- Adjudication and determination under- to be treated as decree under order 21 rule 103- as such first appeal and also second appeal shall lie.

Therefore, it is clear that when an order is being passed after adjudication of the claim of third parties filed under order XXI Rule 97,99 that order is appeal-able.

But when the court in threshold rejected the application, in such case the said order is not a decree within the meaning of rule 98 and 100 of order XXI CPC as such no appeal shall lie.

In the judgment reported in **CCR 2002(1) SC 483** it has held – Maintainability – Application filed under order 21 rule 97 or 99 dismissed at the threshold on the ground of maintainability without making any inquiry into right, title or interest such an order can not be said to have passed under rule 98 or order XXI as decree.

Recently in the case reported in **2020(2) JBCJ 611 (HC)** our own Hon'ble High Court of Jharkhand held that – Resistance of decree- Resistance of execution of decree- if executing court does not enter into the merit of case of parties and passes order on application filed u/o XXI Rule 101 CPC, said order can't be termed as decree U/O XXI rule 103 CPC, and on that situation appeal is not maintainable.

**104 . Order under rule 101 or rule 103 to be subject to the result or pending suit—** Every order made under rule 101 or rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under rule 101 or rule 103 is made has sought to establish a right which he claims to the present possession of the property.

**105 . Hearing of application—** (1) The Court, before which an application under any of the foregoing rules of this Order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the opposite party to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.

Explanation.—An application referred to in sub-rule (1) includes a claim or objection made under rule 58.

Owing to the applicability of the provisions of section 141 to execution proceedings, order IX does not apply to execution proceedings. The result has been that the courts have found it difficult to decide the circumstances in which an application for execution can be dismissed for non- appearance or if a court has dismissed an application for non appearance where the court in the absence of any specific provisions relating to restoration of the execution proceeding, can restore such application Rules 105 and 106 are inserted to deal

with such cases.

106 . **Setting aside order passed ex- parte, etc.**— (1) The applicant, against whom an order is made under sub-rule (2) rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non- appearance when the application was called on for hearing, the Court shall set aside the order or such terms as to costs, or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when applicant had knowledge of the order.]

Rule 105 and 106 of order XXI structured like order IX of the code of Civil Procedure. When we conjointly reading both the provision there are similarity in the provisions.

7. **Restoration of Execution Case** :- When an execution petition is dismissed for default, a restoration application under section 151 CPC is maintainable.

In the case of **Smt. Renu Kumari Vs. Vishwanath Choudhary reported in 1993 PLJR Pat 74** it has been held that it is apparent from the language of Order XXI rule 106(1) that the application contemplated by this provisions is with regard to the setting aside of an ex- parte order under rule 105 (2), rule 105(2) envisages the dismissal of an application for default if on the date fixed for the hearing of the application the applicant fails to appear. The date of dismissal in this provision is referable to the date fixed for hearing of the application. In the instant case the date fixed was not the date fixed for hearing of any application. Thus, it is not covered by rule 105(2) there was no need to filed an application for restoration under order XXI rule 106(1). Consequently, the application under section 151 was legally maintainable.

8. **Execution of Decree with police assistance** :- Order XXI Rule 97 CPC:- In the case of **Rahul S. Shah Vs. Jitendra Kumar Gandhi reported in 2021(2) JLJR (SC) 459**, Hon'ble Supreme Court made directions- the executing court must dispose of the Execution proceeding within six months from the date of filing , which may be extended only by

recording reasons in writing for such delay- executing court may on satisfaction of the fact that it is not possible to execute the decree without police assistance , direct the concerned police station to provide police assistance to such officials who are working towards execution of decree- further , in case an offence against the public servant while discharging his duties is brought to the knowledge of the court, the same must be dealt with stringently in accordance with law – the Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the court personal/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by Executing court.

In view of the above judgment of Hon’ble Supreme Court, Hon’ble High Court of Jharkhand, Ranchi has been pleased to make the following amendments in the “Civil Court Rules of the High Court of Jharkhand”

**Rule 136A.** The Executing Court may on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the officer in-charge of the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

By Applying the law laid down by the Hon’ble Apex court and rules made by the Hon’ble High court of Jharkhand, now it is required to issue writ of delivery of possession of immovable property with police assistance, directing the concerned police station to provide adequate police force at the time of effecting writ of Delivery of Possession, in appropriate cases.

